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In the Supreme Court of the United States

February Term, 1924

The Idaho Irrigation Company, Limited; The Equitable Trust Company of New York, a corporation, and Lyman Rhodes, as trustees, et al,

Appellants,

vs.

Fred W. Gooding, Novinger & Darrah Sheep Company, Limited, T. B. Jones, et al,

Appellees

No. 324

BRIEF OF APPELLEES GOODING, ET AL

Upon Appeal from the United States Circuit Court of Appeals for the Ninth Circuit

W. G. BISSELL, &
BRANCH BIRD,
Of Gooding, Idaho, and
KARL PAINE,
Of Boise, Idaho,
Solicitors for Appellees.

The Lumen, Gooding, Idaho

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BRIEF OF APPELLEES GOODING, ET AL

This brief is on behalf of the appellees Gooding, et al, who were the original plaintifs in the trial court, and is in reply to the brief of appellant, Idaho Irrigation Company, Limited. In this brief all figures in parentheses refer to the respective page numbers of the transcript of the record, and all bold faced type appearing in the quotations is that of the writers.

STATEMENT OF THE CASE

As appelless have attempted to make a full statement of the facts and issues in their brief upon the cross-appeal in this cause we assume that it is not necessary to do so again here. There are one or two matters which we feel counsel for appellant have inadvertently gotten confused in the statement of facts contained in appellant's brief, which we hope to correct.

On page six appellant's brief various acreage figures are quoted which appear to have been taken from defendants' exhibit 11. The full text of this exhibit is as follows:

Carey Act entries	69,107.20
Non-Carey Act, School, Desert, etc.	19,728.51
Total water shares sold	88,835.71
Held by company at time suit commenced	8,467.07
Held by purchasers at time suit commenced	80,368.64
Acquired by company since suit commenced	4,255.57
Held by purchasers at present time	76,113.07
Land entries subject to cancellation (Ex 27)	887.45
Net lands in hands of settlers	75,225.62

This exhibit is entitled "Ownership of land under Idaho Irrigation system." Appellant concludes that 12,045.80 of said 19,728.51 shares had been traded for decreed water. We are unable to find any showing in the record supporting this statement. The Idaho Irrigation Company (which company will hereafter be referred to as the "construction company") did purchase some decreed rights and issue in lieu thereof shares in the company, but these purchased rights are considered as a part of the construction company's water right, and the shares issued therefor are considered a part of the outstanding water contracts and water rights which must be supplied from the available supply of the company. All of said 19,728.51 shares have to be supplied with water from the supply of the construction company. Apparently counsel have confused these decreed rights that were bought by the construction

company with certain "old rights" that are referred to at several points in the record. It is also very apparent that the Circuit Court did not thoroughly understand the exact situation as to these various shares and old rights (675-6). We hope the following detailed statement renders the situation entirely clear to this court.

At the time the construction company filed upon the waters in question a number of appropriations had already been perfected upon the same streams and of the same aggregate supply by individual settlers. A number of these rights were of many years standing and because of their priority their water supply was generally adequate even in low water seasons. Others of these rights were of more recent years and were often inadequate during seasons of low water. The construction company acquired quite a number of the latter class of water rights. This it was able to do because the individuals considered that with the storage facilities contemplated their water right would be made consistent throughout the varying seasons. These individuals were issued shares of stock in the construction company in lieu of such water rights, which shares had to be on a parity with all other contract holders deriving their water from the same system (50). See also, Sanderson v. Salmon River Canal Company, 200 Pac. (Ida.) 341. The owners of many of the "old rights" retained their rights. The extent of these old rights is approximately 100,000 acre feet (254 and 258). Since the filings of the construction company were perfected many other filings have been made by individuals, which filings tend to absorb the excess and flood waters during seasons of unusually high water (259). It will therefore be understood that at the time of the trial of instant

cause there were three classes of water rights all depending upon the same source of supply, which supply the construction company contend constituted the "available" supply for the purchasers of its contracts alone (pp. 10, 67, et al. brief). These three classes have right of priority in and to the aggregate water supply in the order named, to-wit; (1)Old rights, (2) Construction company rights, and (3) Flood rights. This state of facts appears from plaintiffs' exhibit 3 (249), which is explained at page 248 of the record; the testimony of witness Tallman at pages 254, 258 and 259; plaintiffs' exhibit 9 (305); intervener's exhibit 1 (430); plaintiffs' exhibit 2 (245); the testimony of witness Baer (279), and other parts of the record.

At some points in the record these "old rights" are described as "decreed rights." By reading testimony of Watermaster Chapman on pages 244 and 245 it can be readily understood that "decreed rights" refers to those decreed rights which are of prior right to the water right of the construction company and its purchasers. And from this and the above portions of the record it will also be understood that the water for all of these three classes of water rights comes from the same general watershed and that all of it must of necessity pass through the reservoir and system of the appellant construction company.

Therefore, it must be concluded, as stated by Mr. Kays, vice-president and general manager of the construction company (430), at page 434, that the figure 88,835.71, as shown in defendants' exhibit 11 supra

> "represents the total number of shares of stock sold for Carey Act land, for school land, desert land, homestead land, and **all other lands on the date mentioned.** At that time, there were certain lands

standing in the name of M. R. Kays, trustee, Lyman Rhoades, trustee, and Equitable Trust Company of New York, trustee. I believe the Idaho Irrigation Company to be the owner, the beneficial owner, of lands standing in the names of the various parties mentioned and was the beneficial owner at the time of the filing of the complaint and lis pendens in the district court."

The District Court evidently considered that these shares standing in the names of the various trustee defendants, of which the Idaho Irrigation Company was the "beneficial owner," should properly be treated as the property of the construction company for the purposes of this suit,and in sofar as the rights of the appellees are concerned, because they were enjoined from selling the same. The Circuit Court's decree permits certain of these shares so held by the trustee defendants to be sold. This latter decree is the basis of the cross-appeal in this cause, and is presented by separate briefs.

Such matters as percentage loss and the effect of raising the spillway, discussed at pp. 8 and 9 of appellant's brief, will be taken up at the appropriate place in our argument.

BRIEF OF THE ARGUMENT

When patent for lands under a Carey Act project issues to a state and as a condition precedent thereto the Secretary of the Interior concludes that an ample supply of water has been furnished, this conclusion is merely for the purpose of issuing the patent and passing title to the lands to the state, and this conclusion does not relieve the Carey Act construction company of its liability upon contracts made with settlers upon the project to furnish them with a definite and positive

amount of water. Argued and authorities cited at pages 8 to 23 hereof.

A Carey Act construction company is not required to sell and distribute its water over all the patented area if there is not enough water to properly irrigate the same. Argued and authorities cited at pages 23 to 25 hereof.

When title of government lands passes to the state, under the provisions of the Carey Act, the water does not thereby become an inseparable appurtenance to the land, but may be sold and conveyed separately. Argued and supporting authorities cited at pages 25 to 26 hereof.

Under the contracts between the State of Idaho and the construction company and between the latter company and the settlers the settlers are entitled to a definite and positive amount of water, together with a proportionate interest in the system; and this construction is not contrary to the spirit or letter of the state or national Carey Act. Argued and authorities cited at pages 26 to 28 hereof.

The rotation system provided for in the contracts mentioned in the preceding paragraph has to do merely with the method of applying the water to the land, and does not mean that the contracted amount of water for each settler shall be reduced. Argued and authorities cited at pages 28 to 29 hereof.

It is contrary to the laws of Idaho for a Carey Act construction company, or any other company, to contract to sell more water than it has title to; and the fact that patent to the lands under a Carey Act project may have been issued to the state by the government does not warrant the construction company in contracting to sell the entire patented area, if as a matter of fact it has not sufficient water to supply said contracts at the rate

provided therein. In the event the water supply is not sufficient to supply the entire patented area at the contract rate the acreage must be restricted. Argued and authorities cited at pages 31 to 34 hereof.

The appellees are in this court with clean hands. Argued at pages 34 to 37 hereof.

The relief asked for by appellees is not contrary to public policy nor inequitable. Argued at pages 37 to 38 hereof.

The District Court did not err in determining the amount of water available to the construction company, nor in determining the transmission losses, nor in fixing the duty of water. Argued and supporting authorities cited at page 38.

ARGUMENT

Appellant's First Specification of Error

This specification is to the effect that in issuing patent to the lands in this project the Secretary of the Interior determined that there was a sufficient available supply of water to irrigate all the lands patented, to-wit, 117,677.24 acres, and that such finding is conclusive upon the issues raised in this cause.

Under subdivision one of the first specification, appellant cites several cases to the effect that the decision of the land department upon questions of fact is conclusive. As to this general statement we can not take exception, but we strenuously question the application of such rule to the issues now before the court, for the reason that the issues in the cited cases and those in the instant case are entirely foreign. The cited cases having to do with attacks upon patents and similar questions, while the instant case is founded upon contracts in

writing between individuals. Neither the government nor its officials are parties to these contracts.

The second subdivision of the first specification, is that by the issuance of a patent to the lands under the project the Secretary of the Interior determined that an ample supply of water had been furnished. (The patent to 117,000 odd acres issued from the government to the State of Idaho in 1915 (443), and this suit was not filed until 1917). Appellant contends that this patent was issued after due notice thereof was given to the public and after protests and contests had been invited by posted and published notices (brief 16), and since no opposition was made and the patent issued the question of the sufficiency of the water supply cannot now be questioned in any manner of proceeding.

In the first place, from a careful study of the state and federal Carey Acts it will be noted that this procedure of posting and publishing notices calling for protests and contests is not authorized, either directly or indirectly. No mention is made thereof. Under such circumstances what rights did the participants gain? True the act of August 18, 1894, U. S. C. S. 4685, makes reference to reclamation of land as under the desert land law, but the act of June 11, 1896, U. S. C. S. 4686, under which appellant claims to have made proof and obtained a patent to the state, makes no reference to the desert land law, and it must be assumed that under the new law such proof as made in the instant case was not intended. Therefore, nothing could have been gained by a protest or contest of the issuance of the patent because there is no provision therefor, and an attempted contest would have had no standing in court.

In the second place, and admitting that a contest could have been made, the notice in question was dated April 9,

1912, and required any contemplated contests or protests to be made "within the next sixty days following the date of this notice" (444). At that time a comparatively small number of contracts were outstanding (564). Of course, we understand that the figure of 23,068, taken from exhibit 10 at page 564 does not accurately represent the actual number of land then sold, but it will serve to illustrate. The contract holders would certainly be the only parties who could contest under any circumstances, because a mere private citizen, having no special interest in the patented area, would not be able to maintain the contest. Powers v. Webster, 91 Pac. (Wash.) 569. St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 26 Law Ed 875-9.

> "Does the fact that the appellant was not in privity with the government in any respect at the time when the patent was issued to the railroad company prevent him from attacking the patent on the grounds of fraud, error, or irregularity in the issuance thereof as so alleged in the appeal?
>
> "Answer—It does."
>
> Burke v. Southern P. R. Co., 234 U. S. 669, 58 Law Ed 1527-1556.

Then contests could have been made only as to a comparatively small portion of the patented area, and even had such contests been made it is more than likely that at that time there was sufficient water for the lands sold. It is the land that has been sold since that time and since the institution of this suit for which water is wanting, and for these lands the remedy by contest, which appellant contends is the only remedy, is no remedy at all. Every wrong has its remedy. If the allegations of appellees' complaint are true, as the District Court has found to be

the case, it is certain that they have a grievous wrong.

In the third place, it is the contention of appellees that the determination, if any there was, of the Secretary of the Interior in issuing the patent was made merely for the purpose of passing the legal title from the government to the state. That has been done, and appellees are not seeking to undo it. Let the title to those lands remain unmolested forever.

Under the Wyoming statutes having to to do with the appropriation of water and the acquisition of permits therefor, sec. 917 et seq. R. S. Wyo. 1889, the procedure is somewhat similar to that followed in passing title of the lands from the government to the state in the present case. In considering a permit issued by a state officer this court recently said:

> "The permits were based on ex parte applications and were mere licenses to appropriate in accordance with the laws of the state, if the water was available."
>
> Ide v United States, (Adv .Ops. Oct. Term, 1923), 68 Law Ed. 201-5.

The patent was issued long before the project had been completed and it was a physical impossibility for the secretary to have actually determined and found that sufficient water for all the lands patented had been furnished. Such an amount of water has not been furnished at this time. Under the very nature of the transaction it must have been intended by Congress that the Secretary of the Interior should estimate the acreage that could be reclaimed. This is the view that the Circuit Court took of a similar situation:

> "The word 'determined', so used, was evidently used in the sense of estimated; **for in the nature of things it could not then**—in advance of even the

beginning of any work or the actual diversion of any of the water—**be known** what would be the exact capacity of the system. It was necessarily but the estimate of the proposer of the plan approved by the state engineer and the state board of land commissioners, and subsequently by the Secretary of the Interior in segregating the tract applied for from the public domain. How greatly all of them erred in their estimate is shown by the record in the case; the capacity of the system being, as has been said, only about one-third of what it was then thought it would be."

Twin Falls Salmon River Land & W. Co. v Caldwell, 242 Fed. 177-192.

"However, it is well known that the water supply of streams in the arid region fluctuates considerably from year to year so that the question of the sufficiency of the water supply for the irrigation of a tract of land must always be a matter of approximate estimate."

State v Twin Falls Salmon River L. & W. Co., 166 Pac. (Idaho) 220-228.

By the act of August 18, 1894 (U. S. C. S. 4685) it will be noted that the lands had to be "reclaimed and occupied by actual settlers" before patent would issue. By the act of June 11, 1896, (U. S. C. S. 4686) patent may issue "when an ample supply of water is actually furnished in a substantial ditch or canal." The latter provision is extremely uncertain. Does the canal have to be within one mile or forty miles of the land, or does it have to be on the land to be reclaimed? It is generally known that irrigation canals are often many miles in length. When the indefiniteness of this provision is considered, together with the further fact that this latter act provides for the creation of a lien upon the land

immediately after patent issues, which lien shall include "the actual cost and necessary expenses of reclamation," it is apparent that it was the intention of Congress in enacting the latter act to hasten the issuance of the patent and thereby make the lien possible, which would in turn encourage the construction of Carey Act projects by making security for the investment available at an earlier stage of the construction. In order to accomplish this intent less exacting proof was required before issuance of patent. All of which tends to prove that the Secretary of the Interior, in issuing the patent, was merely of the opinion that there was enough water to warrant the passing of title of the lands to the state, in order that a lien might attach thereto and security be made available for the construction of the project. It can not be reasonably said that under such an uncertain requirement as that above noted the secretary really conclusively determined that there was sufficient water to produce ordinary agricultural crops on each of the 117,000 odd acres.

If we are wrong in the foregoing proposition and this court is of the opinion that the Secretary of the Interior in fact found that there was ample water for the patented lands, that would not be equivalent to holding that such finding of the Secretary concludes the issues raised by the pleadings in the present controversy. We think this is one of the vital points of the case. Namely, that the present action is based upon the contracts between the construction company and the settlers, and not upon the patent. We are not attacking the patent, either directly or collaterally.

Independent of the patent proceedings the construction company has entered into contracts with the settlers and issued them certificates of stock which provide, among other things, that

"Each share entitles the owner thereof to receive one-eightieth of a cubic foot of water per second of time for the irrigation of and domestic uses on the following described land . . . in the County of Lincoln and State of Idaho; and this certificate also entitles the owner to a proportionate interest in the dam, canal, reservoir, water rights and all other rights and franchises of this company, based upon the number of shares finally sold, in accordance with the contract between the Idaho Irrigation Company, Limited, and the State of Idaho, dated August 21, 1907, as amended." (89).

The amended contract with the state of Idaho referred to requires this provision—71, 79 and 82. It is apparent that the Secretary of the Interior, in issuing patent, was only required to determine that an ample supply of water had been actually furnished in a ditch or canal, while the construction company agreed with the state and settlers to do a great deal more than that. The construction company has contracted, not only that there is an ample amount of water to irrigate the settler's land and make it produce ordinary agricultural crops, but also that it will construct **(or has constructed) a reservoir and irrigation system sufficient to keep and continue that ample supply available at all seasonable periods and in all ordinary seasons for use by the settler.** In other words, the Secretary of the Interior only determined, at most, that the ample supply was there at that particular moment, but the construction company has contracted that such supply will continue to be available during the life of the contract. It is these latter contracts that this action is founded upon.

It is safe to state that the settlers relied upon the plain and unequivocal statements contained in the contracts providing that a certain amount of water, together

with an interest in the dam and system, would be delivered for use upon the lands they were buying. They were not then concerned with the determination the Secretary of the Interior may have made; a large and then financially responsible corporation, which had built a large reservoir and irrigation system, tenedered them contracts whereby such corporation obligated itself to furnish the purchasers with a positive and ample supply of water. It is ecrtainly not unreasonable to conclude that the purchasers relied upon these contracts, rather than, as appellant maintains, upon the finding of the government in issuing patent. We do not believe that the patent proceedings have any place in the case at all. A proper determination of the issues involves merely the construction of contracts between private citizens and the responsibilties and obligations flowing therefrom. The Secretary of the Interior has not attempted to construe these contracts.

The fifth subdivision of appellant's first specification of error (brief 23) points out wherein certain decisions of the Circuit Court, upon the question of whether or not the determination of the Secretary of the Interior in issuing patent to the state concludes the issues now before this court, are conflicting. A discussion of a large number of these cases must necessarily be made in answering both the second and fifth parts of appellant's argument, beginning on pages 14 and 23, respectively, of its brief. Therefore, these two points will be discussed jointly.

The following decisions dealing directly or indirectly with this point have been rendered by the federal District and Circuit Courts whose decisions are now before this

court for review, and by the supreme court of the state of Idaho:

Caldwell v Twin Falls Salmon River Land & W. Co., 225 Fed. 584 (D. C.);

Twin Falls Salmon River Land & W. Co. v Caldwell, 242 Fed. 177 (C. C. A.);

Twin Falls, etc., Co. v. Caldwell, 272 Fed. 356 (C. C. A.);

Twin Falls Salmon River Land & W. Co. v Alexander, 260 Fed. 270 (D. C.);

Twin Falls Salmon River Land & W. Co. v Davis, 267 Fed. 382 (C. C. A.);

Twin Falls Oakley Land & Water Co. v Martens, 271 Fed. 428 (C. C. A.);

Idaho Irr. Co. v Gooding (instant case), 285 Fed. 453 (C. C. A..)

State v Twin Falls-Salmon River Land & Water Company, 166 Pac. (Ida.) 220 (on rehearing);

State v Twin Falls Land & Water Co., 217 Pac. Ida.) 252; and,

Boley v Twin Falls Canal Co., 217 Pac. (Ida.) 258-62.

We admit that a complete and entirely satisfactory explanation can not be made of these various decisions. However, when the opinions are carefully studied and it is noted that the issues involved are so varied and the relief sought so different, it is not surprising that the decisions do not seem to be entirely harmonious. We do not believe that the decisions conflict fatally or inexpliciably.

The three Caldwell decisions were rendered in one and the same case. A Carey Act project was authorized in excess of 80,000 acres, and contracts for 73,000 acres

were actually entered into with the settlers. Alleging that the water supply was wholly inadequate and only sufficient for 30,000 acres the plaintiffs prayed that all contracts subsequent to the first 30,000 acres be cancelled, that the company and its trustees be enjoined from enforcing collection of the contracts, that a receiver be appointed to take charge of the project and that the company be enjoined from selling further contracts. At the time of filing suit patent had not issued. The Distirct court did not attempt to make a final determination of the case, because the proper parties were not before it, but the District Court did order that the company should be restrained from selling further water contracts (225 Fed. 601). It is interesting to note that the injunctional relief is the approximate relief asked for in the instant case. The Circuit Court affirmed the District Court as to the injunctional feature of the case in the following words (242 Fed. 191):

> " . . . and in view of the fact, shown by the record and which is here undisputed, that the construction company has already sold water rights far beyond the available supply of water, we are also of the opinion that the court below was entirely right in enjoining it from making any further sales."

When this Caldwell case was again before the Circuit Court the injunction was again affirmed, witness the following language appearing on page 367 (272nd Fed.);

> "We accordingly direct that an order be entered that the decree of the District Court be reversed **save and except as to the injunctional provisions thereof,** . . ."

It is apparent that as to the injunctional features there is no lack of harmony in the Caldwell decisions and all of these decisions unquestionably support the District Court's decision in the instant case, because the only

relief sought in the instant case is the injunction (36-7). We believe that all of the decisions agree upon this matter.

As to whether or not the issuance of patent conclusively and finally determined that an adequate supply of water is available, and concludes the issues of this case, the District Court said (144-5):

> "To the contention that the plaintiff are concluded by the patent proceedings in the General Land Office, it is sufficient to respond that they were not parties to the proceedings, and are not bound thereby. They hold contracts imposing upon them heavy obligations, and in turn conferring upon them valuable rights. It would be shocking to hold that these rights could be taken away or substantially impaired by a finding of fact or conclusion of law (we are not advised which) made by an administrative officer in an ex parte proceeding in which they did not have an opprtunity to be heard."

And upon the same question the Circuit Court said (679):

> "They (defendants-appellants) contend that the Secretary of the Interior, when he issued a patent to the state, determined, as a matter of fact, that the water supply was sufficient for the reclamation of the irrigable portion of the 117,677.24 acres of land conveyed to the state, and that such determination binds this court in this case. We cannot accept that view of the law as applicable to this controversy. This suit is upon a contract between the parties. Neither the United States nor the Secretary of the Interior is a party to this action. It is true the State of Idaho, the trustee of the tract of land conveyed by the Secretary of the Interior, is an intervener. But the state is here, not in support of the defendant's claim that the Secretary of the Interior has determined that the available water

supply, as now ascertained, is sufficient for the whole tract; nor is it here even as a neutral. On the contrary, the state is here to say, and to urge upon the court that the available supply of water, as now ascertained, is not sufficient, and that further sales of water rights for the project should be enjoined.

"This action of the state does not aid us in determining the legal question now under consideration, nor does it determine for this court the fact that the outstanding issue of water stock of the Big Wood River Reservoir & Canal Company has exhausted the available water supply for this project; but it tends to prove the fact, and is persuasive official action on the part of the state that the authority and jurisdiction of the Secretary of the Interior should not be extended by the court to questions not clearly and distinctly within his administrative authority and jurisdiction.

In effect, the state agrees with this court in Twin Falls Oakley Land & Water Co. v. Martens, 271 Fed. 248, 433, where this court, speaking through Judge Hunt, said:

"'We believe that, in a proceeding to ascertain whether patents should issue, the finding by the land department upon the question whether the supply is ample is conclusive for the purpose of issuing patent; but that is far from ruling that it is conclusive upon the question whether the plaintiff construction company has provided water at the rate of 1.5 acre-feet per acre as required by its contract with the settler. That is a matter which the Land Department has not undertaken to pass upon, and could not.'

"We see no reason for changing our opinion on that question."

Upon this question the supreme court of Idaho had

the following to say, in the recent case of Boley v. Twin Falls Canal Company, 217 Pac. 258, quoting from page 262:

> "It is urged on behalf of respondent that the state having procured patent from the government for the lands purchased by respondent, it holds these lands in trust for subsequent purchasers; that it obtained patent to the same by reason of having represented to the government that it had provided sufficient water in a substantial canal system to reclaim such lands, and not having offered to reconvey, or given notice of the withdrawal of such lands from further settlement, it is an act of bad faith on the part of the state to refuse water for their reclamation. We do not think that this result follows, for as appears from the record in State and Rayl v. Twin Falls Salmon River L. & W. Co., 30 Idaho, 41, 166 Pac. 220, Caldwell v. Twin Falls Salmon River, Etc., Co., (D. C.) 225 Fed. 584, and Twin Falls Salmon River, etc., Co. v. Caldwell, 242 Fed. 177, 155 C. C. A. 17, it is apparent that both the state and the government have been led into error with regard to the available water supply for a particular segregation, and that the practice has been for such lands to be released to the government and opened for settlement under some other provision of the federal land law. But whatever may be said with regard to an error by the state and the government to patenting to the state a greater amount of lands than can actually be reclaimed under a given system, neither the government nor the state should insist on depriving prior settlers who have located upon this segregation, spent a large amount in improving their lands and bringing them to a high state of cultivation, of the amount of water necessary to reclaim such lands, such water not being in excess of the amount to which the granting clauses in their deeds of conveyance entitled them to receive. ****** No further sale should

be allowed when it would result in diminishing the prior settler's right to less than the maximum amount which they have purchased, that amount being necessary for the successful irrigation of their lands."

The foregoing decisions do not reveal any conflicts, nor even inconsistencies. But these quoted decisions do show the interpretation which the courts have placed upon the question under consideration. This question was fairly raised in these cases and the determinations made are authoritative.

At pages 23 et seq. of their brief counsel for appellant point out instances in which it is claimed the decisions of the Circuit Court are in conflict with its decisions in the instant case and in the Martens case, supra. The three following cases are cited in this connection:

Twin Falls, etc., Co. v. Caldwell, 272 Fed. 356-65-7;

Twin Falls, etc., Co. v. Caldwell, 242 Fed. 177-193;

Twin Falls, etc., Co. v. Davis, 267 Fed. 382-9.

In the Davis case the object of the suit was to prevent the state officials from relinquishing certain segregated lands back to the government. That is, the suit involved the question of the issuance of the patent to the state. The Martens and other cases quoted from above do not have to do with similar issues. The relief sought in the Caldwell case is difficult to describe in a few words, but is summarized to some extent by the Circuit Court in its last decision therein, at page 361 of the 272 Fed. reporter. Furthermore, the Caldwell case has never been finally determined, but it was sent back to the District Court with instructions that new pleadings be drawn, new parties be brought in, etc. (272 Fed. 367-8). As best we can determine, the purpose, or at least one of the

purposes, in both the Davis and the Caldwell cases was to determine what lands should be patented. In other words, those actions affected the patent and land titles; while the instant action affects, not the land title or the patent, but the contractual relation between the construction company and the settlers, under written contracts. Therefore, when the relief sought and the issues are considered we do not believe that there is any serious conflict in the decisions of the Circuit Court.

The contractual rights and responsibilities of the parties to this action were not submitted to the Secretary of the Interior and he has never attempted to determine the same. The Secretary's determination that there was ample water furnished to justify the issuance of patent to the state does not mean that the construction company has complied with its contracts with the appellees and their fellow-settlers. The Secretary may have determined that only a comparatively small amount of water was necessary to warrant the issuance of patent; but this most certainly does not prevent the construction company and the settlers from agreeing among themselves as to what amount of water is necessary for the irrigation of the land so patented. And if the construction company and the settlers make such an agreement it is a matter as between them privately and about which the Secretary has never been in the least concerned. In an unpublished opinion filed in the U. S. District Court for the Southern Division of Idaho May 5, 1923, Judge Dietrich thus tersely summarizes this situation:

> " . . . whatever view may be taken in the patent proceedings by the Secretary of the Interior or Commissioner of the General Land Office touching the sufficiency or insufficiency of the water supply to warrant the issuance of patent, it still devolves

> upon the courts to entertain and independently to adjudicate controversies such as the one here presented. Briefly to amplify: In the one case the question is between the state and the government, an inquiry whether the state has complied with certain statutory requirements, without respect to the obligations the promoting company may have assumed toward the settlers. And in the other, as already suggested, we have only questions of contract rights between private individuals who have chosen to enter into certain agreements conferring and imposing reciprocal rights and obligations."

The title of the case just quoted from is, Commonwealth Trust Co. of Pittsburg v. Glavin. The purpose of the suit was the same as that in the Martens case, namely, an action brought by the assignee of the construction company against a settler for the foreclosure of a water contract, the settler being in default upon his contract payments. The only difference in the two cases is that they arose upon different Carey Act projects in the State of Idaho.

Wherever in this brief the statement is made that a settler is entitled to his contract amount of water, or where a similar statement is made, what is meant is that a settler is entitled to the contract amount of his water, provided that amount is necessary for the beneficial irrigation of his land. JudgeDietrich found the latter amount to be 2¾ acre feet (149). This is less than the contract amount by far, but the trial court had in mind the following Idaho statutory provisions upon this question:

> " . . The amount of water so alloted shall never be in excess of the amount actually used for beneficial purposes for which such right is claimed." C. S. 7033.

> "No person entitled to the use of water from any such ditch or canal, must, under any circumstances, use more water than good husbandry requires for the crop or crops that he cultivates; . . "C. S. 5640.

Upon this point also, State v. Twin Falls-Salmon River Land & Water Co., 166 Pac. (Ida.) 220-233.

The third subdivision of appellant's first specification of error presents the argument that

> "The reasoning of the Circuit Court of Appeals is fallacious because it assumed that the Company could contract to apply the entire water supply to a smaller acreage than the land officials had determined the water supply was sufficient to reclaim. The state had no authority to reapportion the water supply." Appellant's brief, page 19.

In other words, the water rights of the construction company must be sold to and distributed for use upon the entire irrigable portion of the patented area, and none other. Counsel can not consistently urge this proposition, because their client has already sold several thousand shares of such water for use upon other lands than those described in the patent. See Ex. 11, at page 2 of this brief, and Twin Falls Oakley Land & Water Co. v. Martens, 271 Fed. 428-32, par. 4. The contract between the construction company and the state also clearly shows that it was not the real intention of the contracting parties that the water should be scattered out over more land than the dictates of good husbandry and the needs of the lands warranted, witness the following language therefrom:

> "The second party (Idaho Irrigation Company) stipulates and agrees that to the extent of the capacity of the irrigation works and **to the extent of its water rights, it will, as rapidly as** lands are

> open for entry and settlement, sell, or contract to sell, water rights or shares for land to be filed upon to qualified entrymen. (50) . . . .
>
> "But in no case shall water rights or shares be dedicated to any of the lands aforementioned or sold beyond the carrying capacity of the said canal system or **in excess of the appropriation of water as hereinbefore mentioned.**" (54)

In this connection it is also important to note that it is unlawful for a Carey Act construction company to sell water in excess of its appropriation. Secs. 3065 & 5636, Ida. Comp. Stats. Full text of these sections is contained at pages 28 et seq. of cross-appellants brief herein). Another reason which renders this position of counsels' inconsistent is that the appellant has alleged in its answer that when it has sold shares representing the total water appropriated

> " . . . then and in that event, the said Idaho Irrigation Company should make no further sales of water rights by means of selling and issuing shares of stock in the said Big Wood River Reservoir & Canal Company, Limited." (114)

These citations would seem to refute counsels' theory and establish the proposition that the entire water appropriated by a Carey Act construction company does not necessarily have to be sold for use upon the entire patented area, but may be sold for use upon other lands and for use upon a lesser acreage than that patented. See par. 18 of state contract (84); and also the following excerpt from the case of State v. Twin Falls etc. Co., 166 Pac. (Ida.) 220-9:

> "The West and Weaver cases do not hold that where the water supply is inadequate, it must be divided up so as to make it impossible to reclaim

the land in the project. Those decisions have no appliction to the case at bar. **It was not the intention of the framers of the Constitution nor of the several irrigation acts of the legislature to have the public waters of the state so distributed as not to properly irrigate the agricultural lands for which they may be appropriated, and thus make a failure of the proper reclamation of our arid lands.''**

Witness Harris states this proposition thusly (399):

> "If it (the water) is spread over so large an area that the farmers can only get part of what they need, it is impossible for them to prosper, we get discontented farmers, farmers who are not good citizens because of the lack of content, and we have an undesirable condition, . . . the idea being that there is no particular advantage in having a great number of people, if those people are not prosperous, if they are not able to make a living, and are not contented:''

The District Court states the same idea in these words, in the Caldwell case, 225 Fed. 596:

> "Better four prosperous farmers than five who are unsuccessful because of the uncertainty in the water supply, and better four farms uniformly fruitful than five upon which failure is ever imminent, and to which it is bound to come on the average one year in five.''

The fourth subdivision of appellant's first specification of error deals with the effect of the decision of the Circuit Court and, as we interpret the argument, it is claimed that the decision is erroneous because it would permit a part of the water to be detached from the land which the issuance of patent had automatically made such water appurtenant to permanently. To support this theory they cite secs. 3018 and 3019 Ida. Comp. Stats. In Idaho there is no longer any question but that

water, which has become appurtenant to specific land, can thereafter be sold and conveyed and separated from said land, just as a tree, building or any other appurtenance to real property may be. This question is thoroughly briefed at pages 33 et seq. of cross-appellants' brief in this cause. There the two Idaho cases of Bennett v. Twin Falls etc. Co., 150 Pac. 336-40, and Sanderson v. Salmon River Canal Co., 199 Pac. 999-1002, and other authorities, are cited and quoted. These authorities show beyond doubt that it is permissible and proper to transfer water from one tract of land to other lands, in Idaho.

At page 29 of its brief appellant states that at least one of the appellees, the state, took part in the patent proceedings and is bound thereby. The state in dealing with the Carey Act projects acts by virtue of its sovereignty and not in the capacity of a private owner. State v. Twin Falls etc. Co., 166 Pac. (Ida.) 220-33 (679-0).

Appellant's Second Specification of Error

Appellant contends that the water rights sold by the construction company should be construed in harmony with all the provisions of the Carey Act, and that this means that each purchaser only acquires a proportionate interest in the total water right of the company, rather than a definite amount. Appellant further claims that the amount was specified in the contracts merely for the purpose of establishing a maximum. This theory has been unsuccessfully advanced in practically every case of the same general nature for a number of years. To date every court has unhesitatingly decided this point against appellant's contention. During the current year the supreme court of Idaho, in the case of State v. Twin Falls Land & Water Co., 217 Pac. 252-6, stated the law upon this matter as follows:

"It cannot be presumed that the present users of water under this system, when they acquired their rights to its use, intended or understood that they were to receive only an indefinite fractional part of this original appropriation of 3000 second feet, instead of the definite, specific quantity mentioned in the granting clause of their contracts. Such meaning is clearly contrary to the language used. If the state, which subject only to the limitations of law had plenary power to fix the terms and conditions of these contracts between the construction company and the settler, intended that he should have only a fractional, indefinite, and uncertain amount of this appropriation that might remain after all subsequent purchasers of lands lying within the exterior boundaries of the segregation had been granted similar rights, it should have made this condition of the contract clear and unequivocal. Instead of doing so, it was made to read as above stated. . . . .

"The state land board is without authority to authorize a construction company to sell settlers under a Carey Act project an indefinite, fractional water right, but is required to limit such sales to the amount of water available from the company's appriation which can be seasonably delivered by the proposed system."

The case just quoted from and the Boley case, which is reported in the same volume at page 258, are of unusual interest and importance upon many of the issues before this court now, and we request the court to consider both of these decisions in detail. With this in mind we will not occupy space in this brief with statement of the facts of said cases. For further authorities disapproving the proportionate share theory see the following cases:

Boley v. Twin Falls Canal Co., 217 Pac. (Ida.) 258-62;

State v. Twin Falls etc. Co., 166 Pac. (Ida.) 220-9-232;

Caldwell v. Twin Falls etc. Co., 225 Fed. (DC) 584-91;

Twin Falls etc. Co. v. Caldwell, 242 Fed. (CCA) 177-93;

Twin Falls etc. Co. v. Martens, 271 Fed. (CCA) 428-31;

Secs. 2998 and 3064, Ida. Comp. Stats.

Therefore, if a settler under this project acquired a definite and positive amount of water by his contract, then when sufficient contracts have been issued to absorb the water right of the construction company, clearly no further sales should be made, because as each sale is made after that time the water rights of the prior purchasers would be proportionately diminished and he would be deprived of a vested, contractual and valuable right. It should be remembered that the purpose of the present action was not to cut off vested rights, as is the situation in some of the reported cases, but its sole purpose is to prevent further rights accruing. "It is one thing to prevent any more rights vesting, in order to avoid a hardship to those whose rights have already vested, and it is another thing to wipe out rights which have already vested through the issuance of contracts and the use of the water." Sanderson v. Salmon River Canal Company, 200 Pac. (Ida.) 341-3.

In this connection appellant takes the position (brief p. 40-1) that the provisions in the contract providing for the installation of a system of rotation shows that the company was not obligated to deliver a definite amount of water. This same question was raised in the Caldwell

case, so often referred to. In that case the District Court concluded that these provisions had to do with the "method of delivery," rather than the "extent of the right." 225 Fed. 598. The Circuit Court agreed with the District Court upon this matter. 242 Fed. 193 and 4.

The evidence shows that the rotation system can only be used to a limited extent between the smaller owners (349); where a larger head of water is used by the rotation system the waste is greater (376); the soil will be injured (417); and upon several of the tracts the canals and ditches are not constructed large enough to permit the practical adaptation of the rotation system (373-4).

Under this specification of error, and at other points of its brief, appellant contends that the action of the District Court in enjoining further sales deprives the construction company of its contemplated lien upon all the patented area, and thereby prevents the company from being remunerated for its work. As the construction company contended in the Circuit Court, the action of the District Court deprives the construction company and its assignees of the lien on some 13,000 acres of land. To this contention we make the brief reply that a Carey Act construction company is not entitled to a lien until it has made permanently available to the settlers sufficient water to reasonably irrigate the land and render it productive; it is not sufficient that the land may be reclaimed:

Childs v. Neitzel, 141 Pac. (Ida.) 77-85;

Twin Falls etc. Co. v. Davis, 267 Fed. (CCA) 382-7;

Twin Falls etc. Co. v Alexander, 260 Fed. (D. C.) 270-5;

Twin Falls etc. Co. v. Martens, 271 Fed. (CCA) 428-33;

To the general statement made by appellant's counsel numerous time, that the one and only purpose of the Carey Act is the reclamation of the land, and that all contracts and court decisions must be interpreted in that light, we do not take any exception. However, we do desire to add to this statement by stating that it is the intent and purpose of the state and national Carey Act and all proceedings thereunder that the desert lands shall be "thoroughly reclaimed," reclaimed in such manner as to enable them to produce ordinary agricultural crops.

> "The purpose of the Carey Act of Congress and of our legislative enactments accepting for Idaho its benefits is the reclamation and irrigation of desert lands in a manner and to an extent that will make them productive and valuable for agricultural purposes."
>
> State v. Twin Falls etc. Co., 166 Pac. (Ida.) 220-31.

The best available authority for our position upon this question is that of common sense and practical thought. To say to a settler, who holds a written contract providing that he shall have a definite amount of water, that he shall not in fact receive that definite amount of water nor even enough thereof to thoroughly irrigate his lands, but that as a matter of law he is only entitled to receive a proportionate interest of such water as is available, would be equivalent to advising the settler that he had no water right at all. Or at best he would only be getting an uncertain and chimerical proportion in an unknown quantity.

It is generally known that many settlers on western projects are former residents of the east,who buy without personal knowledge of the water and conditions existing, but in reliance upon the representations and agreements

of the construction company. If a construction company is not limited in its sales by the amount of water on hand and is not required to deliver to its purchasers any definite amount of water under the prescribed contracts, it could continue indefinitely with sales to unwary purchasers. Every purchaser under a Carey Act has equal priority of right with the other purchasers. If appellant's theories are upheld a state of affairs could be arrived at, and not in the far distant future, whereby the appellees and their co-settlers would not have enough water to irrigate one-tenth of the land they now have under cultivation. Certainly no such fraudulent and unfair results are contemplated by the various Carey Act enactments.

Under this specification of error, and at page 43 of its brief, appellant quotes from the case of State v. Twin Falls etc. Co., 121 Pac. (Ida.) 1039-50, which quotation apparently tends to support the "proportionate share theory." This court dismissed the appeal from that decision for want of jurisdiction. See 59 Law Ed. 427. However, the case has recently been discussed by the supreme court of Idaho in two instances, and, so far as it holds that the proportionate share theory applies to situations like that now in hand, it has been effectively overruled.

State v. Twin Falls etc. Co., 217 Pac. (Ida.) 252-7;

Boley v. Twin Falls Canal Co., 217 Pac. (Ida.) 258-61.

Appellant's Third Specification of Error

This specification claims that the Secretary of the Interior has determined that the water supply was ample to irrigate the patented area and because of this determination neither the state nor its Commissioner of Reclamation can reapportion that water supply to a

smaller acreage. Appellant states that there was no law in existence at the time the lands were patented authorizing the state officers to limit the area for which water rights might be sold, and points out that sec. 3004 C. S. was not enacted until after the issuance of the patent. In making this statement counsel apparently overlook the provisions of secs. 3065 and 5636 C. S., both of which were in force prior to the issuance of the patent. (Full text of these two sections may be found at pages 28-9 of cross-appellants' brief in this cause). These two sections apply to all persons, officers and corporations. Sec. 3004 merely points out a method of procedure whereby the law as represented by said sections 5636 and 3065 may be made more effective.

Further, said sec. 3004 does not impair the obligation of appellant's contract, as its counsel assert. As heretofore pointed out, the contract in question specifically limits the sale of water and water contracts by the Idaho Irrigation Company **"to the extent of the capacity of the irrigation works and to the extent of its water rights."** (72). See also last part of paragraph eight of the same contract (76). Under this contract the appellant did not have the legal right to sell more water than it actually had title to, therefrom section 3004 did not deprive appellant of any right under the contract. In this connection counsel asserts (brief, 45) that to permit this power to be in a state officer in effect transfers the administration of the public lands from the government to the state officials. The answer to that is, that the purpose of this action is merely to control the water, and there is no conscious effort or desire to in any way control or hamper the free and unlimited sale and disposition of land titles. The prayer of the complaint is directed toward the water only. As to the water, it is

only proper and lawful that the state officials should have absolute control. The federal and state courts recognize this.

> "The relation of the federal government to the state government in the reclamation of desert lands arises out of the fact that the federal government owns the lands, and Congress is invested by the constitution with the power of disposing of the same, while the state has been given jurisdiction to provide for the appropriation and beneficial use of the waters of the state which necessarily includes a use for the reclamation of such lands."

Twin Falls etc. Co., v. Caldwell, 272 Fed. (CCA) 356-7.

> "The provision of C. S. No. 5556, which declares all the waters of the state, when flowing in their natural channels, including the waters of all springs and lakes within the boundaries of the state, to be the property of the state, being in harmony with article 15, No. 1, of the constitution, this right of the state was recognized by the act of Congress admitting the state into the Union, which thereby confirmed this provision of the constitution the people of the state had formed, and consented to such appropriation by the state. Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 Pac. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918."

Short v. Praisewater, 208 Pac. (Ida.) 844-7.

Under these authorities it must be clear that the State of Idaho is absolutely the owner of all the waters within its boundaries, which flow in their natural channels. In fact title to the public waters never leaves the state completely, because

> "All rights to the use of water acquired under this chapter or otherwise shall be lost and abandoned by a failure for the term of five years to apply

it to the beneficial use for which it was appropriated, and when any right to the use of water shall be lost through nonuse or abandonment such rights to such water shall revert to the state and be again subject to appropriation under this chapter. . . .'' Sec. 5582, Comp. Stats. Idaho.

Counsel place some reliance upon the two Idaho cases of Furbee v. Alexander, 176 Pac. 97 and Evans v. Swendsen, 200 Pac. 136. It will be noted that the decisions in these cases turn upon the point that the applicant in each case had complied with all the laws and the board had no authority to determine any matters other than the qualifications of an entryman. The facts and issues in the instant case are so entirely different that we can not see how the cited cases are authoritative upon any point.

Appellant's Fourth Specification of Error

By this specification appellants assert that the appellees are not in a court of equity with clean hands and are therefore not entitled to relief. Practically all of appellant's argument upon this point is directed against the appellee, the State of Idaho, and it is claimed that, since the state officials have approved the patent proceedings, they should not now be permitted to assert that there is an inadequate that the State of Idaho is only in this case incidentally. The records will show that the Attorney General of Idaho did not file a brief in the Circuit Court, and the writer's information is that he does not intend to do so in this court. This action was instituted and is being prosecuted by the bona fide settlers and contract holders under the Idaho Irrigation Company project, and the questions involved should be determined with this fact in mind. If the public officers of the State of Idaho have inadvertently reported an adequate supply of water and

recommended the issuance of the patent, that fact should not deprive the appellees of their contract rights with the construction company. The contracts of the settlers which form the basis of the present action are not that the State of Idaho will furnish such contract holders with certain water, but the contracts are that the appellant Idaho Irrigation Company will do so. Any conclusions or findings of state officials prior to the execution of said contracts can not legally affect the obligations and rights afforded by the contracts.

> " . . . The report of that official (state engineer) cannot be held to have been information upon which plaintiff entered into the contract. The State of Idaho made no representations to the original projectors in reliance upon which they were induced to enter upon a project pursuant to the Carey Act."
>
> Twin Falls etc. Co. v. Davis, 267 Fed. (CCA) 382-9.

It is undoubtedly true that either the settlers or the construction company will suffer a considerable loss because of the outcome of the enterprise. Naturally appellant contends that the settlers should bear the loss, and visa versa. Admitting for the sake of argument only that appellant and appellees are equally innocent of wrong doing and improper motives; and likewise admitting that the state and government officials, in approving the project and issuing patent, were of the opinion that the same was feasible; nevertheless it is true beyond question that the construction company and its promoters made the first error. The first step in organizing such a project is the proposal for the segregation made by the construction company to the state. Sec. 2998 et seq. C. S. Idaho. Isn't it only natural to assume that before making this proposal and before undertaking such an investment that

the construction company made an investigation of the water supply and all surrounding conditions?

> "It was primarily the irrigation company that erred in its judgment. But as it made the contracts with the settlers, who relied upon the ability of the company to live up to its contracts, and who have obligated themselves to make deferred payments, results must be reached upon a recognition of the contractual relations."
>
> Twin Falls etc. Co. v. Martens, 271 Fed. (CCA) 428-32.

In this connection see also the quotation from Childs v. Neitzel, 141 Pac. (Ida.) 77-81, contained in cross-appellants' brief at pages 46-7. As pointed out in these decisions, the settlers are not in a position to send engineers into the field to investigate the water supply and the feasibility of the project, but on the other hand the settler depends, as he has a right to do, on the ability of the construction company to make the contract amount of water available within one-half mile of the settler's land. It is a matter of common knowledge that many of these Carey Act settlers are residents of distant localities and are thoroughly unfamiliar with the conditions on western irrigated sections. Appellant has not pointed out that the settlers are not in this court with clean hands. These appellees' hands are clean and there is no reason why they should not have a good standing in this court.

Appellant further insists that, since the settlers bought their lands from the State of Idaho, they are the mere assignees of the state and stand in the same position as the state with reference to the water supply; that the state officials found that there was ample water and neither the state nor the settlers can say otherwise now. The answer to this contention is a brief one. Appellees did not buy the water from the state, and the sale of the

water is all that .they are seeking to have enjoined Appellees purchased their lands from one party and their water rights from another, and even though there might have been some equities attached to the land purchases (which we do not admit), certainly the water purchases were made in such manner as to be free from any taint attached to the state's tilte to the lands.

Appellant's Fifth Specification of Error

It is claimed that it would be contrary to public policy to enforce specific performance of the settlers' contracts. It is placing too narrow a construction upon the relief asked in this cause to denominate it "specific performance." Assuming that the trial court's findings are anything like correct it is very apparent that the appellees will not nearly receive the amount of water called for in their contracts. If this is true they are certainly not getting specific performance. In fact the District Court's decree only allows the settlers a little more than one-half the amount of water the construction company agreed that they should have. The remedy sought by appellees is the only practical one available. At any rate no better method of procedure has been suggested.

At page 57 of its brief appellant contends that it is the recognized policy of the government that the "distribution of the water supply available for irrigation" was intended to be left in the hands of the federal officials. We believe that we have shown the contrary to be the case. See pages 33 et seq, of this brief. We do not believe that the cases counsel cite upon this proposition support their views, because the cases cited deal largely with land matters, and not irrigation matters.

Preventing the sale of further rights does not increase the water rights of appellees, because they have an in-

adequate right, even if the District Court's decree is affirmed. And if the Circuit Court's decree is permitted to stand their rights will be far below what the District Court determined they should have for the production of agricultural crops, and will be very far below the contract amounts. On the other hand, every share of water that is sold by the construction company after the available supply is exhausted necessarily diminishes the water right of every settler on the project, and thereby impairs the obligation of the contract between the settlers and the construction company. If the construction company has already sold its appropriation it "would be to ignore both the spirit and the leter of the contract between the state and the company" to permit it to sell further shares. State v. Twin Falls etc. Co., 166 Pac. (Ida.) 220-9.

Appellant's Sixth Specification of Error

Under this specification appellant argues that the District Court erred in determining the amount of water available and the amount required for reclamation, and that in fact the amount available is ample for more lands than the acreage fixed by the court.

By this specification we believe apellant raises the one and only real issue worthy of consideration by this court. We are sincere in this statement, and our reason therefor is as follows: By their answer herein the appelant and the trustee appellants

> "Admit that under and by virtue of the terms of the said contracts, Exhibits "C" and "D," when the said Idaho Irrigation Company, Limited, had in truth and in fact sold shares in said company which should and did represent the actual amount of water available and appropriated, and when said sale of shares should equal the carrying capacity of said irrigation system, then and in that event, the said Idaho Irri-

gation Company should make no further sales of water rights by means of selling and issuing shares of stock in the said Big Wood River Reservoir and Canal Company, Limited." (114).

Exhibits "C" and "D" are the contract and supplemental contract between the State of Idaho and the construction company. In other words, this is an unequivocal and unreserved admission by appellant that it should not sell more water rights than it has water to supply. This takes every other issue out of the case and only leaves it for the court to determine whether or not the construction company has as a matter of fact sold its entire available supply of water. The District Court said:

> "But there is no necessity for finding, and hence I do not attempt to determine, the exact amount of water available for defendant's use. It is sufficient to know that with the duty hereinbefore recognized the supply is and will be insufficient to meet the demands of the outstanding contracts, exclusive of those involved in this suit, and **I have no hesitation in so finding.** Accordingly, the prayer of the complaint will be granted." (151)

The Circuit Court said:

> "The evidence submitted by the defendants tends to establish the fact that not only has the water supply for this project been exhausted by the sales of shares already sold of water stock, but **that the available water supply** has been very much oversold. (676) . . . . .
>
> "We are of the opinion that the evidence supports the findings contained in the opinion of the court, and that the findings and conclusions of law support the decree. The decree is accordingly affirmed." (683)

The situation then is, that the construction company and its trustees (all the original defendants) have admitted that if and when the available supply has been sold they should sell no more water (669); both the District and Circuit courts have found that said construction company and its trustees have more than sold the available supply; this finding was made upon conflicting evidence. It will be noted that the Circuit Court bases its finding upon this point upon "the evidence submitted by the defendants." Therefore, unless appellant can show that this finding is not supported by the evidence, we urgently insist that the decree of the District Court must be affirmed. We will briefly review the evidence submitted upon this phase of the case.

From our study of the record of this case we conclude that there were two classes of evidence submitted to the court upon this question: The first class being represented by plaintiffs' exhibit 3 (248), plaintiffs' exhibit 1 (243), plaintiffs' exhibit 9 (305), and interveners' exhibit 1 (430); while the second class of evidence upon this matter is represented by plaintiffs' exhibit 10 (370), defendants' exhibit 13 (572) and defendants' exhibit 14 (573).

Neither the District nor the Circuit Court seems to have given a great deal of weight to the exhibits named in the first class. In this respect there is no question but that the courts acted judiciously. This evidence was submitted largely by the appellees, but the appellees were not in possession of the records of the construction company and, until the trial was well under way and subpoenas duces tecum had been employed they were unable to get the records of the company. This first class of evidence, and the exhibits named as such, did

not constitute data and evidence sufficient for the purposes of this case for the following reasons:

First: These exhibits included the total run-off of the entire watershed, or the total inflow into the reservoir (243), and as shown in our statement of the case (page 1 et seq. of this brief) the total inflow into the reservoir was not available for distribution to the settlers under the Idaho Irrigation Company system. A great deal of appellant's argument upon this point is based upon this fallacious assumption, namely, that the total run-off of the entire watershed was available for use to the purchasers of the construction company. Such is far from the fact.

Second: These exhibits included a large quantity of water which ran over the spillway during seasons of high water and was wasted into Snake river. There was not even an approximate record of this wasted water available. (253, 259, 293, 294, 306 and 575).

Third: These exhibits included a large amount of water that escaped from the system and became waste at the Thorpe place. Record of this amount was available to the court for only a few months during the entire period of years covered by the exhibits. (301-2).

Third: These exhibits included the amounts of water that went to supply the flood rights and later users, of which there was no record at all. (259).

Fourth: These exhibits included the waters belonging to the "old rights" (241, 254 and 258, also see said exhibits). These rights approximated 100,000 acre feet.

Fifth: These exhibits included the canal loss of 30 per cent (264, 279, 150 and 416).

Sixth: These exhibits included the river loss of 100 acre feet per day. The statutory irrigation period in Idaho is from April 1 to November 1 (674). Twin Falls

etc. Co. v. Lind, 94 Pac. (Ida.) 348-51. This river loss is not included in the canal loss (279).

Seventh: These exhibits included the reservoir losses from seepage and evaporation, amounting to 12,800 acre feet (272).

Eighth: Some of these exhibits include waters that waste through the Little Wood River. The flow of this river can be utilized for only a portion of the year by the users under this project (241-3, 250 and 430).

On the other hand, the other exhibits named under the second class tended to show the actual amount of water for use by the settlers upon the project of the Idaho Irrigation Company. As shown from the remarks of the District Court 271-2, and the statements contained in its opinion (149-0), it is easily apparent that the District Court considered defendants' exhibits 13 and 14 and plaintiffs' exhibit 10 as constituting the most dependable evidence from which to determine the amount of water available to the appellees. And the record also makes it clear that the Circuit Court was of the same opinion (674-5).

Considering plaintiffs' exhibit 10 and defendants' exhibits 13 and 14 as being the best evidence of the actual amount of water available for use by the appellees and their fellow-settlers, was the District Court in error in finding that the water supply has already been oversold? As to plaintiffs' exhibit 10, it will be noted that the information contained on this chart was taken from the records of the Idaho Irrigation Company for the years 1911 to 1917, inclusive, and from the records of the reclamation office for the year 1918-19 (369). An average of these reservoir storings, as enumerated in figures at pages 369-0 of the record, is 163,222 acre feet. When this amount undergoes the canal and river losses,

etc., it certainly will not show that there was more water available to the settlers under this project than the trial court found, to-wit, 122,849 acre feet. Defendants' exhibits 13 and 14 (572-3) show the amount of water available at the heads of the main canals, and at the farmers' headgates, respectively. The difference shows the amount of waste and loss (574, 150 and 675).

The District Court seems to have taken the average of said exhibit 14 (150) as the basis for its conclusion. The average is 122,849, rather than 122,817 acre feet. Appellants objection to this is put in these words (brief 67):

> "The trial court, however, ignored all evidence of water available and based its decision on the water delivered, treating the two as synonymous."

And in support of this proposition appellant seeks to show that in the early years of the project there was an over-abundance of water, and that settlers were furnished more water than really necessary, a great deal was permitted to go to waste, etc. The record does not prove this situation to us. Mr. Kays the vice-president and general manager of the construction company testifies that this situation existed to a certain extent prior to and including the season of 1913, but that since that time, except for one flood season, the practice has not been followed (559-0). On the contrary, the record shows that the reservoir was completely drained and the water shut off to the settlers under the Idaho Irrigation Company project on August 3, 1918, (295-435) and on July 29, 1919, (295-435). When it is remembered that the statutory irrigation season in Idaho extends to November 1 it is very clear that the company was not burdened with an over-supply that should have been wasted down the river or given to settlers in excessive

amounts for those two years. This showing certainly disproves appellant's theory upon this matter. It is also of interest to note that at the time of the trial, February 23, 1920, the reservoir was again dry (150). These facts would justify the court in determining that the amount delivered and the amount available is oftentimes synonymous. The reservoir was also emptied in 1911 and in 1915 (435). In other words the reservoir has been drained five out of nine seasons. This being true, we cannot see that the District Court assumed an improper criterion when he decreed that the project must not be increased beyond its then extent.

The amount that the court found to be available for actual use by the appellees finds further support in the testimony of witness Baer. Mr. Baer, a civil engineer in the employ of the state reclamation service and thoroughly familiar with the project in question (261), testified that

> " . . . the amount of water that would reach the farmers' headgates after deducting all losses, would be 123,760 acre feet." (279)

In discussing the acreage (brief 61 et seq) counsel conclude that all the "sold acreage" will never be in cultivation, and that allowance should be made for roadways, waste, etc. In the first pace, the construction company does not issue shares for waste and non-irrigable land; and in the second place, in determining the duty of water, the amount to be furnished, etc., the construction company in making its contracts, and the court in rendering its decree, took into consideration the fact that every tract has to employ a certain amount of land for roads, homes and the like (149). These matters are too elementary and well known to deserve further discussion.

Upon thought it must also be understood that all the land for which water was purchased could not be put under cultivation in the first few years, because it takes a great deal of money and hard labor to transform a sagebrush desert into an alfalfa field, and the average settler is not financially or physically able to reclaim all of his purchase within the first year or two. But with the passing of years this land for which water has been purchased will be gradually reclaimed until the amount under cultivation will be practically equivalent to the amount sold, that is, if the water can be had. We believe that it would be manifestly unjust and unfair for a court to accept apellant's view and fix the acreage upon the assumption that some of the land for which water has been sold will not be cultivated. In the natural course of events this land will be reclaimed and it is surely entitled to its water. Is it reasonable that the construction company should contend otherwise?

Appellant states (brief 64) that appellees pleaded that there was water for 70,000 acres, and the intimation is that the court should not have fixed a smaller acreage, and that apellees are not in a position to ask that a smaller acreage be fixed. Appellant quotes from paragraph 20 of the complaint (31), but it will be noted that the portion of this paragraph which appellant quotes was stricken out. These lines were drawn through this portion of the paragraph during the trial. Afterwards, upon stipulation of counsel it was agreed that the pleadings should be deemed amended to conform to the proof (580), and in conformity with this stipulation, and in order to make the record clear, the court entered its order amending the last fifteen lines of said paragraph 20 to conform to the proof (98). We do not believe that it is unreasonable to permit this nature of amendment

in cases similar to that at issue, for the plaintiffs did not have the records and figures at their disposal in preparing the complaint. True, the court's order was not made and entered until after the decree, but this was merely a ministerial act and the date is not of great importance, provided the order is substantiated by the proofs in the case. At any rate, appellants are not in a position to object to the amendment to conform to the proof in this case as it was done upon stipulation had with their counsel (580).

Appellant objects that the court did not give the construction company credit for the increased storage capacity effected by raising the spillway in 1917 (67-8). This spillway was built in 1917, yet the record shows that the reservoir was drained on August 3, 1918, (295 and 435), again on July 29, 1919, (435), and was dry February 23, 1920, (150). Evidently the court would not have been justified in concluding that this spillway helped the situation materially. We believe that all of the evidence was considered by the District Court. The witness Baer, in fixing the amount available at the farmers' headgates at the figure of 123,760 acre feet, did consider the increased storage capacity of the reservoir (279).

Appellant occupies a couple of pages in an attempt to show that the District Court should not have taken the average for all the years covered in the exhibits in determining the general average. In support of this the case of Wyoming v. Colorado, 259 U. S. 419 is cited. But counsel conclude this portion of their argument by saying: That the method outlined in the cited case "would not materially change the results as to the water supply" (brief 73). According to our computation the appelication of the method in the cited cases would alter

the figure the District Court fixed as an average two-fifths of one per cent. This is hardly material enough to support an objection upon appeal!

LOSSES

Appellant maintains that the transmission loss, which the District Court considered as being in excess of 35 per cent (150), should not have been fixed above 30 per cent (brief 74-5). A number of witnesses did fix the canal loss at 30 per cent and one witness fixed the loss at 30 to 35 per cent (416) but these estimates do not take into consideration the river loss (279), which it is agreed amounts to 100 acre feet per day (283). As the irrigation season extends from April 1 to November 1 (see page 41 this brief) this river loss would amount to 21,400 acre feet each season, which would materially increase the percentage of loss. Further, the District Court stated the percentage of loss was determined from the records furnished by the construction company (150). From a comparison of defendants' exhibits 13 and 14 (572-3) it is easy to know that there is a tremendous system loss. It was only proper for the District Court to have considered this fact in fixing the acreage.

DUTY OF WATER

The trial court found that the duty of water on the project should be fixed at 2¾ acre feet (149). Appellants now claim that it should have been fixed at 2 acre feet (brief 78). We do not understand how counsel are in a position to make this assertion. By their answer appellants (113)

> "Admit that the certificates of stock in the Big Wood River Reservoir and Canal Company, Limited, entitle the purchaser thereof to receive one-eightieth (1-80) of one cubic foot of water per second of time per acre."

If water is delivered to the settlers at the rate specified in said certificates they would get approximately 5½ acre feet (674), rather than the 2¾ which the District Court limited them to. In view of this admission in appellants' answer they certainly are not in a position to contend that the duty fixed by the District Court be changed. The settlers have been awarded a great deal less than appellants admitted they are entitled to and counsel should be content with this result.

We do not believe that the duty of water as fixed by other courts in other cases can be of material assistance in this case. To show this, and also to show that the project in question requires an unusual amount of water, we point out the following high points of the evidence touching this matter:

Senator F. R. Gooding, who has been familiar with the whole tract since 1889 by virtue of his having been a stockman and operating as such over this territory, gives a good resume of the whole situation, at pages 339 to 357, inclusive, of the record. Water will not stand in pot holes or low places on the tract, but goes right down through the soil, through fissures in the underlying formation of lava strata and disappears entirely (287). The same is true on the Dietrich tract,

> "I have attempted to hold water in reservoirs on my place it goes down in the ground. I have got a couple of pot holes on my place, but the water won't last only two or three days. The water goes right down." (308)

On the Richfield tract the same porous condition of the underlying lava bed exists. A farmer built a cistern fourteen feet in depth and placed a two-inch drain pipe in the bottom, and he states that the wind comes up through this pipe, and there are three or four other

cisterns in the neighborhood in the same condition (318).

Another witness speaking of the North Gooding tract states,

> "The lava is cracked and full of fissures. To the best of my knowledge the substrata of lava on that tract has fissures, cracks or crevices or caves in it." (359)

Also speaking of the North Gooding tract it is said:

> "However, there is on another farm I own a single hole, not where water stands, but **a regular cave,** where a man could go into. There is an air current that comes through that melts the snow during the entire winter when there is any snow on the ground. And again there is a suction in that. Sometimes the air comes up and again the air goes down." (330)

The South Gooding tract is likewise sandy (322), potholes will not hold water more than a day or two (324), and ponds and cisterns will not hold water (325).

Speaking of the North Shoshone tract a witness states:

> "It is commonly known as lava ash, with quite a bit of lava float and lava outcrop. . . . . (358).

The foregoing extracts alone will readily convince this court that the tract is a subnormal one in a good many respects. The conditions exsiting upon this project certainly warranted the two lower courts in stating that,

> "Clearly, the conditions upon the project are not favorable to a high duty of water. In point of topography, the lands are comparatively rough, and in many places reefs of rock project above the surface. As a consequence the surface runoff is necessarily above normal. And there is also greater loss in transmission, owing to the increased length of service ditches on the farm. The soil is of very uneven depth, and as a consequence the unavoidable loss from deep percolation is above normal, and this

loss cannot be recovered, because the water escapes through a substratum of fractured rock to unknown depths. On portions of the tract the soil is of fair texture, upon others it is coarse and sandy. The rainfall is almost negligible, and high winds prevail." (678)

The District Court stated that under present conditions three acre feet, delivered at the times when same is needed, is probably sufficient, but not more than sufficient on the average, for the land actually irrigated. However, anticipating that the system could be improved and certain losses checked the court fixed the duty at 2¾ acre feet (149). It is therefore apparent that the District Court has taken into consideration the actual situation, and has given the appellants the benefit of the possibility of the improvement of the system. The evidence in the record certainly supports the District Court's finding upon this point. The trial court has made a finding based upon conflicting evidence. This finding can not be set aside upon the showing made.

Appellant bitterly assails the action of the lower courts in refusing to consider the expert testimony upon the question of the duty of water. Taking these experts one by one, what does the record show their qualifications to be so far as the project under consideration is concerned:

Plaintiffs' expert witness Harris has been in many schools and is familiar with many irrigation projects, but as to the present project he can only say that he is "somewhat familiar" therewith (382). He fixes the duty at 4½ acre feet (398).

Plaintiffs' expert witness Tallman shows better qualifications than the other experts, as he has made experiments on most of the projects in Southern Idaho (411).

He states that the losses are greater on the Idaho Irrigation Company project than on the other projects because of the peculiar and unfavorable lava formations (414). His opinion is that the duty of water should be fixed at 4 or 4½ acre feet (417).

Defendants' expert witness Thom fixed the duty at two acre feet (553), but admits that the "foundation" for his opinion was experiments conducted at Pullman, Washington, (558).

Defendants' expert witness Widstoe likewise fixes the duty at two acre feet (498), but upon cross examination admits that most of his experiments were conducted at Cache Valley, Utah (509).

Defendants' expert witness Bark places the duty at 2½ acre feet on the land (528), but his experiments were made upon ideal conditions (542) and at an experiment station (526).

Defendants' farmer witness Hayward resides on the Salmon River tract (565) and does not appear to have had any experience on the tract under consideration.

In addition to the above the record contains the testimony of witness Badley upon this point. Badley is an engineer of considerable experience (289), and was employed by the farmers on the Idaho Irrigation Company project for five years thereby becoming familiar with the entire project (371). He states that

> "Where the farmers were getting their full five-eighths of an inch of water at their headgates, in some instances they were getting a fairly good crop. In other instances . . . .
>
> "In my opinion as an irrigation engineer, and based on my knowledge of this project, the land on that project can not be watered efficiently and effectually for the purpose of producing ordinary

agricultural crops with a less amount of water than five-eights of an inch." (374-5)

In other words, plaintiffs' witnesses have testified as to a duty varying from 4 to 5½; while defendants' witnesses have varied from 2 to 2½. The court in fixing 2¾ has apparently leaned toward the testimony of defendants' witnesses. At any rate, there is a serious conflict in this testimony, and, under the rule of law too old to require repetition, this finding of the District Court is conclusive upon appellate courts.

CONCLUSION

By combining defendants' exhibit 10, 13 and 14 the Circuit Court arrived at the following figures (675):

Average amount of water delivered at main canal headgates for years 1911 to 1919, inclusive	209,031
Average same period at farmers' headgates	122,850
Average acreage in cultivation same period	34,291
Average per acre in acre feet	3,835

The District Court's decree fixes the acreage in the project at approximately 76,000 acres. That is, more than double the acreage used in the above estimates. If this acreage of 76,000 is used with said average amount of water it is easily aparent that the duty of water will be very seriously, if not fatally, affected; passing the serious question of whether or not there is enough water to permit the project to reasonably exist under the District Court's decree. By reference to defendants' exhibit 10 (564) it will be noted that the cultivated acreage has materially increased since 1917; jumping from 39,121 acres in 1917 to 56,864 acres in 1919. These facts explain why the reservoir was drained before the ends of the seasons in 1918 and 1919 (435), and explain why it was dry at the time of trial (150). Upon this

showing isn't there reasonable ground for alarm by the appellees as to what the result will be when the full 76,000 acres are in cultivation. If some of these 76,000 acres were not in cultivation at the time of the trial and therefore were not demanding their water, this fact cannot effect the outcome of this action. In the natural course of events all of said 76,000 acres will be in cultivation, and all thereof is entitled to its water under the Court's decree just as unquestionably as if it had been demanding and using the water at the time of the trial.

If the Circuit Court's decree, allowing 5322.26 additional acres to be sold, is upheld there is no question but that the rights of the appellees will be seriously impaired, if not effectively destroyed in some instances.

In view of the whole record and the authorities cited in this brief, it is respectfully submitted that equity and justice can only be subserved by an affirmance of the decree of the District Court. While this relief will not place the appellees in nearly so favorable a position as they are entitled to be in under the terms of their contracts with appellant, and will not even assure them of receiving an amount approaching the amount the District Court has found they should have to enable their lands to produce ordinary agricultural crops, yet it is the fullest relief that this court can afford.

Respectfully submitted,

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Solicitors for Appellees.

APPENDIX

The following appendix includes so much of the state statutes cited in this brief, as is deemed necessary for the court's full information, in accordance with rule 21 of the rules of this court.

Section 1, Article 15, Constitution of Idaho. Use of waters a public use. The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a pubile use, and subject to the regulation and control of the state in the manner prescribed by law.

Section 2998. Proposals to construct irrigation works. Any person, company of persons, association or incorporated company, constructing, having constructed or desiring to construct, ditches, canals, or other irrigation works to reclaim land under the provisions of this chapter shall file with the department of reclamation a request for the selection, on behalf of the state, by the department, of the land to be reclaimed, designating said land by legal subdivisions.

This request shall be accompanied by a proposal to construct the ditch, canal or other irrigation works necessary for the complete reclamation of the land asked to be selected. The proposal shall be prepared in accordance with the rules of the department of reclamation of Idaho and with the regulations of the department of the interior; and shall be accompanied by the certificate of the department of reclamation that application for permit to appropriate water has been filed in its office,

together with the department's report thereon. It shall state the source of water supply, the location and dimensions of the proposed works, the estimated cost thereof, the price and terms per acre at which **perpetual water rights will be sold to settlers on the land to be reclaimed, said perpetual rights to embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto.** * * * *

Section 3004. Contract for Construction. (See record 671-2 for portion of this section applicable).

Section 3064. Water contracts and deeds. All contracts and deeds for the sale of water rights shall be of the form approved by the department of reclamation, as provided in section 3063, and all such contracts or deeds shall be numbered plainly and consecutively; and it shall be the duty of the owner of such irrigation works to file for record in the proper county recorder's office all such contracts or deeds, or duplicate copies thereof, in the order in which the same are issued to purchasers.

Section 3065. Penalties for unauthorized sale of water rights. Any pretended deed, contract or other instrument conveying or pretending to convey water rights in such irrigation works prior to the filing of such certificate in the county recorder's office or in excess of the water rights or amount of water authorized to be sold by the department, as shown by the certificate or certificates so issued and filed for record, shall be absolutely null and void, and the owner of such irrigation works, or those claiming to be the owner thereof and the officers, agents and representatives of any such owner or claimant or those claiming to be the officers, agents or representatives of any such owner or claimant, who shall make or attempt to make any deed, contract, or agreement relative to the sale of water rights in such

irrigation works, or for the furnishing of water therefrom, prior to the filing of such certificate, or in excess of the capacity of such irrigation works, as shown by the certificate or certificates of the department of reclamation, or who shall violate any of the provisions of section 3064, shall be jointly, severally and personally liable upon and for all such contracts and agreements and for any and all damages, directly or indirectly sustained by the purchasers of water rights or interests in such irrigation works, through the failure of such owner or claimant, or of the officers, agents or representatives of such owner or claimant or of those claiming to be the officers, agents or representatives of such owner or claimant, to comply with the provisions of this chapter, and in addition thereto, every such owner, claimant, officer, agent or representative shall be guilty of a misdemeanor, punishable by a fine not less than $100 nor more than $300, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

Section 5556. Nature of property in water. Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, in providing for its use, shall equally guard all the various interests involved. All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose, and the right to

the use of any of the waters of the state for useful or beneficial purposes is recognized and confirmed; and the right to the use of any of the public waters which have heretofore been or may hereafter be allotted or beneficially applied, shall not be considered as being a property right in itself, but such right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied; and the right to continue the use of any such water shall never be denied or prevented from any other cause than the failure on the part of the user thereof to pay the ordinary charges or assessments which may be made to cover the expenses for the delivery of such water.

Section 5582. Change of place of use: Appeal from department's decision. All rights to the use of water acquired under this chapter or otherwise shall be lost and abandoned by a failure for the term of five years to apply it to the beneficial use for which it was appropriated, and when any right to the use of water shall be lost through nonuse or abandonment such rights to such water shall revert to the state and be again subject to appropriation under this chapter: * * * *

Section 5636. Company to furnish water on demand. Any person, company or corporation owning or controlling any canal or irrigation works for the distribution of water under a sale or rental thereof, shall furnish water to any person or persons owning or controlling any land under such canal or irrigation works for the purpose of irrigating such land or for domestic purposes, upon a proper demand being made and reasonable security being given for the payment thereof: Provided, that no person, company or corporation shall contract to deliver more water than such person, company or corporation has a title to, by reason of having complied

with the laws in regard to the appropriation of the public waters of this state.

Section 5640. Liability for waste of water. No person entitled to the use of water from any such ditch or canal, must, under any circumstances, use more water than good husbandry requires for the crop or crops that he cultivates; and any person using an excess of water, is liable to the owner of such ditch or canal for the value of such excess; and in addition thereto, is liable for all damages sustained by any other person, who would have been entitled to the use of such excess water, as fixed by this section.

Section 7033. Decreed rights appurtenant to land. In alloting the waters of any stream by the district court according to the rights and priorities of those using such waters, such allotment shall be made to the use to which such water is beneficially applied, and when such water is used for irrigation, the right confirmed by such decree or allotment shall be appurtenant to and become a part of the land which is irrigated by such water, and such right will pass with the conveyance of such land, and such decree shall describe the land to which such water shall become so appurtenant. The amount of water so alloted shall never be in excess of the amount actually used for beneficial purposes for which such right is claimed. • • • •